



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/06990/2018

**THE IMMIGRATION ACTS**

**Heard at Field House  
On 2 November 2018**

**Decision & reasons Promulgated  
On 30 November 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE CHANA**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**I [T]**

**~~(ANONYMITY DIRECTION NOT MADE)~~**

Respondent

**Representation:**

For the appellant: Ms I Davies, Senior Presenting Officer

For the respondent: Ms H. E. Adeyumo of Counsel

**DECISION AND REASONS**

- 1.** The appellant is the Secretary of State for the Home Department and the respondent is a citizen of the Ukraine. However, for convenience, I refer below to Mr [T] as the appellant and to the Secretary of State as the respondent, which are the designations they had before the First-tier Tribunal.
- 2.** The Secretary of State appeals with permission to the Upper Tribunal against the decision of First-tier Tribunal Judge Coutts promulgated on 26 July 2018, allowing the appellant's appeal pursuant to Article 3 human rights of the European Convention on human rights. The respondent had

refused the appellant's claim for asylum and humanitarian protection in the United Kingdom.

3. First-tier Tribunal Judge Shimmin in granting permission in a decision dated 23 August 2018 stated that it is arguable that the Judge erred when reaching a perverse or irrational conclusion that was contrary to the evidence.

### **The First-tier Tribunal Judge's findings**

4. First-tier Tribunal Judge gave the following reasons for allowing the appellant's appeal pursuant to Article 3 of the European Convention on Human Rights. The Judge in the decision set out the background of the appeal which is that the appellant fled Ukraine in March 2015 and after travelling through several safe European countries arrived in the United Kingdom illegally in April 2015. The Judge found that the appellant not credible in respect of this claim under the refugee Convention or for humanitarian protection. It was accepted by the respondent that the appellant had served as a junior sergeant in the Ukrainian army. The Judge stated that he was not satisfied that a person's refusal to participate in military service would be an act of political opposition.
5. In respect of Article 3 the Judge stated that the appellant does not dispute that he was found in possession, when encountered by the respondent's officers, with a false Lithuanian identity card. However, the Judge accepted the appellant's explanation that he was fleeing from potential ill-treatment in Ukraine and therefore it is plausible the appellant would engage an agent and use this false document as a means of entry.
6. The Judge found that the respondent's assertion that the appellant and his wife, agreed to voluntarily return to Ukraine on 11 April 2018 with the flight being arranged for them to leave from Gatwick airport shows that there were not at risk. The Judge stated that he attaches little weight to the screenshot from the respondent system as being indicative of the appellant having no fear of the authorities upon their return to Ukraine but found the appellant's explanation plausible namely that he had been encountered by the respondent's officers who had told him that he had no choice but he still did not want to return and when he was able to pursue his legal options he told the respondent that she was not returning.
7. The Judge accepted that the appellant received the summons from the military at friend Victor's house because Victor managed to change the appellant's registration to his home. The Judge found that the appellant paid his friend Victor \$50 and his identity card to change the appellant's registration address by unofficial means. The Judge found It was possible to make a change of registration in this way at that time and it was commonly used by people. The Judge accepted this evidence.
8. The Judge stated that respondent has rejected the documents provided by the appellant, but the respondent had the opportunity to verify them with

the Ukrainian authorities, particularly the court judgement, and has chosen not to do so. It is plausible that the appellant, as he claims, brought his documents with him when he fled from Ukraine. The Judge found that there was no reason to doubt their authenticity.

9. The court judgement dated 9 March 2015 states that the appellant has been sentenced to 2 years imprisonment for his failure to mobilise for the Ukrainian army when called upon to do so. In **VB another (draft evaders in prison conditions) Ukraine CG [2017] UKUT 00079 (IAC)** the Upper Tribunal held that there is a real risk of anyone being returned to Ukraine as a convicted criminal having been sentenced to a term of imprisonment of being detained on arrival. Moreover, there is a real risk that the conditions of detention and imprisonment in Ukraine would subject a person returned to be detained or imprisoned to be a breach of Article 3 of the human rights Convention.
10. The Judge found that article 3 of the human rights Convention is engaged and allowed the appellant's appeal on human rights grounds.

### **Grounds of appeal**

11. The respondent's grounds of appeal which I summarise are the following. The Judge did not find the appellant's claim for asylum and humanitarian protection credible. The Judge however accepted that the appellant will be detained upon his arrival in Ukraine because he has been summoned by the army. The Judge has made an incorrect assessment in his findings. The Judge has based his findings of the Court's judgement dated 9 March 2015. The appellant provided photocopies are not originals and the onus is upon the appellant to corroborate evidence for his claim which he has not done.
12. The appellant and his wife discussed voluntary return to Ukraine in detail and agreed to return. This is a clear indication that the appellant and his wife did not have any genuine fear of returning to the Ukraine at this point. The appellant left Ukraine and travelled through Europe and then illegally entered the United Kingdom on 9 March 2015. It took the appellant three years to make his claim but only after he was accosted by immigration authorities. His account is therefore hampered by this fact. The Judge has made a material error of law in allowing the appellant's appeal.

### **The hearing**

13. At the hearing both parties make submissions whether there is an error of law.

### **Findings as to whether there is an error of law**

14. There was no dispute that the appellant entered the United Kingdom illegally in 2015 and did not make protection claim until three years later and after he was apprehended by immigration authorities.

- 15.** The Judge made material errors of law in his findings of fact and law. The Judge reversed the burden of proof and said that it was for the respondent to verify the documents provided by the appellant to show that he has been convicted and sentenced to 2 years imprisonment for his failure to mobilise for the Ukrainian army when called upon to do so.
- 16.** Given that the Judge primarily relied on these documents for his decision that the appellant cannot be returned to Ukraine because he will be detained at the airport and which will be in breach of his Article 3 rights.
- 17.** The Judge found that the appellant was not credible in respect of his claim for asylum and humanitarian protection which he dismissed. It is difficult to understand therefore why the Judge would find the appellant's evidence credible in respect of the documents and his claim that he has been sentenced to 2 years imprisonment. The documents are not original documents but copies and therefore it was incumbent on the Judge to take that into account. Failure to do so meant that the Judge fell into material error.
- 18.** I find that there is a material error of law in the decision for the reasons set out above. Consequential to my finding that there is a material error of law, I set aside the decision of Judge Coutts and remit the appeal to the first-tier Tribunal to be heard de novo. I direct that the appeal be placed before any First-tier Tribunal Judge other than Judge Coutts.

### **Decision**

- 19.** The appeal by the Secretary of State is allowed and the decision of First-tier Tribunal Judge is set aside. I remit the decision to the first-tier Tribunal.

Signed by

Dated this 26<sup>th</sup> day of

November 2018  
A Deputy Judge of the Upper Tribunal Judge  
Ms S Chana